**IN THE UNITED STATES DISTRICT COURT**
**FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

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| AVERY TALMADGE,<br>Petitioner, | : | |
| v. | : | CIVIL ACTION |
| EDWARD KLEM,<br>and<br>THE DISTRICT ATTORNEY OF THE COUNTY OF PHILADELPHIA,<br>and THE ATTORNEY GENERAL OF THE STATE OF PENNSYLVANIA,<br>Respondents. | : | NO. 04-CV-2720 |

**MEMORANDUM & ORDER**

YOHN, J. December _____, 2005

Petitioner Avery Talmadge, a prisoner at the State Correctional Institution at Mahanoy, Pennsylvania, brings this *pro se* petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254. United States Magistrate Judge Jacob P. Hart filed a Report and Recommendation ("report & recommendation") recommending denial of the petition and petitioner filed objections to the report & recommendation. After conducting a *de novo* review of the record and the report and recommendation, and upon consideration of petitioner's objections to the report and recommendation, the petition will be dismissed and denied.

## I. BACKGROUND[1]

In the early morning hours of February 26, 1994, Demetrius Shelley and one of the petitioner's friends were fighting outside a store at 60th and Locust Streets in Philadelphia.

[1]The facts in this section are substantially similar to the facts set forth in the report and recommendation and the Commonwealth's answer. *See Talmadge v. Klem*, No. 04-2720, (E.D. Pa. July 27, 2005).

During the course of the fight, the petitioner intervened and an argument began between the petitioner and Shelley. During the argument, Talmadge took a gun from his coat pocket and shot Shelley in the chest, causing his death.

Talmadge fled to North Carolina. On December 29, 1995 he was arrested by North Carolina police on an unrelated matter. The petitioner was extradited to Philadelphia on February 14, 1996.

On September 15, 1997, just before jury selection was to begin, petitioner waived his right to a jury trial. During the following two days, he was tried in the Court of Common Pleas, Criminal Division, before the Honorable James A. Lineberger. Although Talmadge admitted shooting the victim, he claimed that he acted in self-defense.

During the trial, the defense filed a motion in limine to preclude the Commonwealth from introducing evidence relating to Talmadge's arrest for auto theft in North Carolina. The Motions Judge, the Honorable Carolyn Engle Temin, presided over the hearing on the motion. Judge Temin ordered that evidence pertaining to Talmadge's arrest for auto theft and two car chases that preceded the arrest, was inadmissible. (Mot. in Limine Hr'g Tr. 10, Sept. 17, 1997.) However, Judge Temin ruled admissible evidence that the North Carolina police had reason to contact the defendant, that defendant gave the police a false name, and that petitioner possessed two guns when he was brought into custody. *Id.* at 11.

At trial, Detective Joseph Fischer[2] of the Philadelphia Police Department testified

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[2]In both the petitioner's Reply to Response to Petition for Writ of Habeas Corpus (Doc. No. 16, filed May 16, 2005) and Petitioner's Objections to the Report and Recommendation (Doc. No. 19, filed August 12, 2005), the petitioner attributes the following testimony to Officer John Cannon. However, the transcript shows that it was Detective Fischer, not Officer Cannon who testified regarding the North Carolina arrest. (Trial Tr. 125-6, Sept. 16, 1997.)

regarding the apprehension of the petitioner:

> MR. CONROY: Detective, if you can, from the time that you received the fugitive package, put together a fugitive package, tell us exactly what you did from the beginning when you were assigned this case in the attempt to apprehend the defendant?
> . . .
> DET. FISCHER: 1/5/96 we received information that Avery Talmadge had been arrested in North Carolina for auto theft.
> MR. SIEGEL (defense attorney): Objection to.
> DET. FISCHER: I'm sorry.
> MR. CONROY (prosecutor): Okay. You had -
> THE COURT: Sustained.
> DET. FISCHER: I'm sorry.

(Trial Tr. 121-6, Sept. 16, 1997). The next day, Talmadge took the stand in his own defense and on cross examination the prosecutor asked the petitioner a question about the incident in North Carolina. The judge sustained trial counsel's objection; however, he did not grant a mistrial:

> MR. CONROY (prosecutor): Sir, when you were down in North Carolina, you actually, in an effort to elude law enforcement, actually had two high-speed car chases?
> MR. SIEGEL (defense attorney): Objection.
> THE COURT: Sustained.
> MR. CONROY: Sir, you were down in North Carolina -
> MR. SIEGEL: As a matter of fact, I move for a mistrial.
> THE COURT: Motion for a mistrial is denied, but stick to the -
> MR. CONROY: All right.
> THE COURT: - cross examination based on the testimony that he -
> MR. CONROY: Yes, your honor. Yes, your honor.
> THE COURT: - he has rendered today.

(Trial Tr. 60-1, Sept. 17, 1997.) Also, during the trial, Detective Brad Stanley, of the North Carolina Police Department testified that when he arrested Talmadge, he found two .380 handguns hidden among the petitioner's shoes and clothing, in the basement of the home where the petitioner was staying. *Id.* at 29-34.

On September 17, 1997, Judge Lineberger found Talmadge guilty of first-degree murder, possessing an instrument of crime, and carrying a firearm on public property. (Trial Tr. 89-90, Sept. 17, 1997.) The petitioner was sentenced to life imprisonment for first-degree murder, plus concurrent, lesser sentences for the other offenses.

Petitioner filed timely post-sentence motions, claiming that Judge Temin erred in failing to preclude evidence regarding the petitioner's possession of two guns when he was brought into custody and that the trial court erred in denying a defense motion for a mistrial after the prosecutor questioned Talmadge regarding the car chases in North Carolina.[3] These post sentence motions were denied on January 26, 1998, and an opinion was filed on August 18, 1998. *See Commonwealth v. Talmadge*, No. 0778, 1/1 at 1 (Philadelphia C.P. Aug. 18, 1998).

Petitioner filed a timely notice of direct appeal; however, counsel failed to file a brief and the Superior Court dismissed the appeal on December 9, 1998. Subsequently, defense counsel filed a motion to reinstate petitioner's rights *nunc pro tunc*, which was granted on February 19, 1999. The petitioner raised the following issues in his appeal: 1) the evidence was insufficient to sustain the conviction; 2) the verdict was against the weight of the evidence; 3) he was entitled to a new trial as a result of the *in limine* ruling which allowed the admission of two guns seized when the petitioner was arrested; 4) he was entitled to a new trial as a result of the *in limine* ruling which allowed the admission of evidence with regard to the petitioner's arrest in North

[3]The petitioner also argued that Judge Temin erred by ruling evidence of petitioner's auto theft arrest in North Carolina admissible. *See Commonwealth v. Talmadge*, No. 0778, 1/1 at 1 (Philadelphia C.P. Aug. 18, 1998). However, Judge Temin in fact ruled the evidence of this arrest inadmissible. (Mot. in Limine Hr'g Tr. 10, Sept. 17, 1997) ("The fact of the stolen car charge cannot be introduced.")

Carolina.[4] The Superior Court affirmed the trial court's judgment in an order dated March 28, 2000, and on August 22, 2000, the Supreme Court of Pennsylvania denied allocatur review. *Commonwealth v. Talmadge*, 757 A.2d 998 (Pa. Super. Ct. 2000) (table); *Commonwealth v. Talmadge*, 564 Pa. 731 (2000).

On December 28, 2000, the petitioner filed a *pro se* petition for collateral relief under Pennsylvania's Post Conviction Relief Act ("PCRA"), 42 Pa. Cons. Stat. § 9541, *et seq*. Counsel was appointed and the petition was amended. The following issues were raised: 1) ineffective assistance of counsel; 2) violation of defendant's rights under the Constitution and laws of Pennsylvania or the Constitution of the United States; 3) prosecutorial misconduct based on the prosecutor's violation of the *in limine* ruling barring evidence of the car chases in North Carolina; 4) Judge Temin erred in ruling the two guns found in the petitioner's residence admissible. The PCRA Court dismissed the petition on July 11, 2002 and issued an opinion on March 3, 2003. *Commonwealth v. Talmadge*, No. 0778 at 1 (Philadelphia C.P. Mar. 3, 2003).

On April 10, 2003, Talmadge, with the help of counsel, appealed the denial of his PCRA petition to the Superior Court, claiming: 1) prosecutorial misconduct for violating an in limine ruling by questioning the petitioner regarding the high speed car chases, 2) Judge Temin erred in ruling the two guns were admissible because it led to cross examination of the petitioner regarding the uncharged auto theft offenses, 3) appellate counsel was ineffective for failing to raise the foregoing issues on appeal. The Superior Court affirmed the PCRA Court's decision on October 20, 2003 and the Supreme Court refused *allocatur* review on April 7, 2004. *Commonwealth v. Talmadge,* 839 A.2d 1164 (Pa. Super. 2003); *Commonwealth v. Talmadge,*

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[4]*See supra* at n. 3

847 A.2d 1284 (Pa. 2004).

On June 21, 2004, Talmadge filed the current habeas petition. Petitioner raises two claims: 1) he was denied a fair trial, in violation of the Sixth and Fourteenth Amendments, when the prosecutor violated the in limine ruling by questioning petitioner about car chases in North Carolina, and 2) he was denied a fair trial, in violation of the Sixth and Fourteenth Amendments, when Judge Temin permitted the admission of evidence relating to the confiscation of two handguns. On April 29, 2005, the Commonwealth filed an answer, arguing that Talmadge's claims are non-reviewable because they are procedurally defaulted and that they have no merit.

Magistrate Judge Hart issued his report and recommendation on July 27, 2005. On August 12, 2005, the petitioner filed his objections to the report and recommendation.

## II. STANDARD OF REVIEW

### *A. Jurisdiction*

Where a habeas petition has been referred to a magistrate judge for a report and recommendation, this court reviews "those portions of the report or specified proposed findings or recommendations to which objection is made" *de novo*. 28 U.S.C. at § 636(b). After conducting this review, I "may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate." *Id.*

### *B. AEDPA's Standards*

Under 28 U.S.C. § 2254, federal courts are empowered to grant habeas corpus relief to a prisoner "in custody pursuant to the judgment of a State court" where his custody violates the Constitution of the United States. 28 U.S.C. § 2254(a). Because the present petition is governed

by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214 (codified in scattered sections of 28 U.S.C.), petitioner is entitled to habeas relief only where the state court proceedings "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law," or "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(1).

A state court decision may be "contrary to" clearly established federal law "if the state court arrives at a conclusion opposite to that reached by this Court on a question of law or if the state court decides a case differently than this Court has on a set of materially indistinguishable facts." *Williams v. Taylor*, 529 U.S. 362, 413 (2000). A state court decision involves an "unreasonable application" of federal law, on the other hand, where it "correctly identifies the governing legal rule but applies it unreasonably to the facts of a particular prisoner's case." *Id.* at 407-08.

Habeas relief will also be granted where a state court decision is "based on an unreasonable determination of the facts." 28 U.S.C. § 2254(d)(1). Under AEDPA, however, factual determinations made by the state court are accorded a presumption of correctness: "a federal court must presume that the factual findings of both state trial and appellate courts are correct, a presumption that can only be overcome on the basis of clear and convincing evidence to the contrary." *Stevens v. Delaware Corr. Ctr.*, 295 F.3d 361, 368 (3d Cir. 2002) (citing 28 U.S.C. § 2254(e)(1)). Thus, to prevail under this "unreasonable determination" prong, petitioner must demonstrate that the state court's determination of the facts was objectively unreasonable in light of the evidence available; mere disagreement with the state court – or even a showing of

erroneous fact finding by the state court – will be insufficient to warrant relief, provided that the state court acted reasonably. *See Weaver v. Bowersox*, 241 F.3d 1024, 1030 (8th Cir. 2001) (citing *Williams*, 529 U.S. at 409); *Torres v. Prunty*, 223 F.3d 1103, 1107-08 (9th Cir. 2000) (citing same).

*C. Exhaustion and Procedural Default*

Federal habeas relief pursuant to 28 U.S.C. § 2254 is available to a state prisoner only when he has exhausted his remedies in state court. "In other words, the state prisoner must give the state courts an opportunity to act on his claims before he presents those claims to a federal court in a habeas petition." *O'Sullivan v. Boerckel*, 526 U.S. 838, 842 (1999); 28 U.S.C. § 2254(b)(1)(A).

This exhaustion rule requires petitioner to "fairly present" each of his federal claims to the state courts. *Bronshtein v. Horn*, 404 F.3d 700, 725 (3d Cir. 2005). To "fairly present" a claim, petitioner must present its "factual and legal substance to the state courts in a manner that puts them on notice that a federal claim is being asserted." *McCandless v. Vaughn*, 172 F.3d 255, 261 (3d Cir. 1999) (citations omitted). While petitioner need not cite "book and verse" of the federal Constitution, *Picard v. Connor*, 404 U.S. 270, 277 (1971), the petitioner's state court pleadings must present "the legal theory and supporting facts asserted in the federal habeas petition in such a manner that the claims raised in the state courts are 'substantially equivalent' to those asserted in the federal court." *Doctor v. Walters*, 96 F.3d 675, 678 (3d Cir. 1996). Mere similarity of claims is insufficient to exhaust. *Picard*, supra at 276. "It is not enough that all the facts necessary to support the federal claim were before the state courts, or that a somewhat similar state-law claim was made." *Anderson v. Harless*, 459 U.S. 4, 6 (1982).

Failure to present a federal habeas claim to the state courts in a timely fashion results in procedural default of the claim. *See O'Sullivan*, 526 U.S. at 848 (citing *Coleman v. Thompson*, 501 U.S. 722, 731 (1991)). A procedural default occurs when "the final state court presented with a federal claim refuses to decide its merits based on an established state rule of law independent of the federal claim and adequate to support the refusal." *Sistrunk v. Vaughn*, 96 F.3d 666, 673 (3d Cir. 1996). "A habeas petitioner who has defaulted his federal claims in state court meets the technical requirements for exhaustion; there are no state remedies any longer 'available' to him." *Coleman*, 501 U.S. at 732 (citing 28 U.S.C. § 2254(b)). Like petitioners who have failed to exhaust their state remedies, however, "a habeas petitioner who has failed to meet the State's procedural requirements for presenting his federal claims has deprived the state courts of an opportunity to address those claims in the first instance." *Id.* This doctrine of procedural default, therefore, ensures that state prisoners cannot evade the exhaustion requirement of § 2254 by defaulting their federal claims in state court.

A federal court is barred from reviewing a petitioner's defaulted claim unless the petitioner can show that the procedural default should be excused. As the Supreme Court stated in *Coleman v. Thompson*, procedural default can be excused in only two ways:

> In all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice.

501 U.S. 722, 750 (1991). To show "cause," petitioner must demonstrate that "some objective

factor external to the defense impeded counsel's efforts to comply with the State's procedural rule." *Murray v. Carrier*, 477 U.S. 478, 488 (1986).[5] To show "actual prejudice," a petitioner must demonstrate that the alleged errors "so infected the entire trial that the resulting conviction violates due process." *United States v. Frady*, 456 U.S. 152, 168-69 (1982).[6]

## III. DISCUSSION

### *A. Prosecutorial Misconduct Claim*

Talmadge argues that the prosecutor indulged in misconduct by questioning the petitioner on cross examination about two high-speed car chases in North Carolina. Petitioner claims that the prosecutor intentionally violated a motion in limine precluding evidence of the car chases, and that this misconduct warrants a new trial. In response, the Commonwealth argues that the claim is procedurally defaulted and even if the claim was not defaulted, it is meritless. I find that Talmadge's prosecutorial misconduct claim is procedurally defaulted, because petitioner never raised it in any state court, and the petitioner has not demonstrated sufficient cause to excuse the default.

Before reaching the merits of a petitioner's claims, this court must decide whether the

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[5] Examples of "cause" include a showing that "the factual or legal basis for a claim was not reasonably available to counsel," that "some interference by officials made compliance impracticable," or that "some external impediment prevented counsel from constructing or raising the claim." *Murray*, 477 U.S. at 488-92.

[6] The second manner in which a petitioner's procedural default can be excused – the "fundamental miscarriage of justice" exception – "will apply only in extraordinary cases, i.e., 'where a constitutional violation has probably resulted in the conviction of one who is actually innocent . . . .'" *Werts v. Vaughn*, 228 F.3d 178, 193 (3d Cir. 2000) (quoting *Murray*, 477 U.S. at 496). This exception to the exhaustion requirement is not at issue here.

**claim was exhausted in the state proceedings.** If a habeas petitioner wishes to exhaust a claim that a state court denied him due process of law based on prosecutorial misconduct he must "apprise the state court of his claim that the evidentiary ruling of which he complained was not only a violation of state law, but denied him the due process of law guaranteed by the Fourteenth Amendment." *Duncan v. Henry*, 513 U.S. 364, 366 (1995). Talmadge's brief on direct appeal to the Superior Court of Pennsylvania does discuss the prosecutor's question about the North Carolina car chases. The issue, however, was framed entirely as one of state evidentiary law; Talmadge never fairly presented his federal due process argument to the state courts. Talmadge's direct appeal brief claimed he was entitled to a new trial because the in limine ruling wrongfully allowed the Commonwealth to introduce evidence of the car chases. (Brief for the Appellant, *Commonwealth v. Talmadge*, No. 9603-0778, July 16, 1999, p. 29). Talmadge argued:

> Presentation of testimony with regard to unrelated crimes allows the trial judge to conclude that the defendant was bent on committing criminal behavior without regard to location or circumstance. If the attempt to present testimony that the defendant had engaged the police in North Carolina in high-speed chases is considered, the trial judge had to conclude that the defendant must be guilty because he has no regard for the law. The fact that the defendant's case was heard non-jury is not determinative. A trier-of-fact, whether it is judge or jury can still be influenced by prejudicial evidence with regard to unrelated criminal conduct.

*Id.*

Furthermore, Talmadge's direct appeal brief limited its discussion to the prejudicial effects of this testimony, without reference to prosecutorial misconduct. In fact, the brief seemed to assume that evidence regarding the car chases was ruled admissible, when it in fact had been ruled inadmissible by Judge Temin. *See Commonwealth v. Talmadge*, No. 0778 at 1 (Philadelphia C.P. Aug. 18, 1998). Talmadge's presentation and discussion of this issue on direct

appeal amounted to a garden variety evidentiary issue and this is how the state courts reviewed it.[7] It had nothing to do with the prosecutor's ill-advised question concerning the car chases, which is now the crux of his claim. Hence, Talmadge did not raise a claim of prosecutorial misconduct on direct appeal.

Because Talmadge had the opportunity to raise his claim on direct appeal, yet did not bring it until his PCRA appeal, the claim was waived under Pennsylvania law and is now procedurally defaulted. Talmadge first raised his claim of prosecutorial misconduct in his PCRA petition to the Court of Common Pleas. The court decided the claim was meritless. *Commonwealth v. Talmadge,* No. 0778, at 2 (Philadelphia C.P. Mar. 3, 2003). On collateral appeal, the Superior Court found that the prosecutorial misconduct claim was waived because Talmadge failed to present the claim on direct appeal. *Commonwealth v. Talmadge*, No. 2397 EDA 2002, at 4 (Pa. Super. Ct. Oct. 20, 2003). "To be eligible for relief under the PCRA, a petitioner must establish, as a threshold matter, that his allegations have not been waived." *Commonwealth v. Rivera*, 816 A.2d 282, 287 (Pa. Super. 2003) (quotations omitted). The Superior Court dismissed the prosecutorial misconduct claim as waived because 42 Pa. C.S.A. § 9544(b) states that a petitioner waives a claim if he "could have raised the claim but failed to do so before trial, at trial, during unitary review or on appeal"and Talmadge could have raised this claim on direct appeal. Thus, 42 Pa. C.S.A. § 9544(b) creates an independent and adequate state

[7]On direct appeal, the Court of Common Pleas decided this issue solely on state evidentiary precedent. *Commonwealth v. Talmadge*, No. 0778, at 2-3 (Philadelphia C.P. Aug. 18, 1998). The Superior Court found that the trial court's opinion throughly addressed and correctly disposed of this issue. *Commonwealth v. Talmadge*, No. 713 EDA 1999, at 2 (Pa. Super. Ct. Mar. 28, 2000).

procedural default to bar consideration of the merits of Talmadge's claim in federal court.

Absent a showing that default should be excused, this court is barred from reviewing petitioner's claims. Talmadge claims that cause and prejudice exist to overcome the procedural default because appellate counsel was ineffective for failing to raise the prosecutorial misconduct claim on direct appeal.[8] (Reply to Resp. to Pet. for Writ of Habeas Corpus at 2.)

Counsel's ineffectiveness in failing to properly preserve a claim for review in state court may serve as "cause" to excuse a procedural default; however, counsel must have been so ineffective as to violate the Federal Constitution. *Edwards v. Carpenter*, 529 U.S. 446, 451 (2000). "In other words, ineffective assistance adequate to establish cause for the procedural default of some *other* constitutional claim [must be] *itself* an independent constitutional claim." *Id.* (emphasis in original). Principles of comity and federalism require an ineffective assistance of counsel claim,

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[8]Talmadge also claims that "cause" exists to excuse the procedural default because his amended PCRA petition asserting the ineffectiveness claim was not included in the certified record on appeal. (Reply to Resp. to Pet. for Writ of Habeas Corpus at 2.) The Superior Court deemed his ineffective assistance of counsel claim waived because Talmadge "failed to include this ineffectiveness claim in his *pro se* PCRA petition" and there was no record of an amended PCRA petition asserting this claim. *Commonwealth v. Talmadge*, No. 2397 EDA 2002, at 3, 7 (Pa. Super. Ct. Oct. 20, 2003). However, the ineffectiveness claim was fully briefed by Talmadge in his PCRA appeal, and the Superior Court went on to address the ineffective assistance of counsel claim on its merits, despite its finding a procedural waiver of the claim. *Id.* at 7-10 ("Even if not waived, we do not find that appellate counsel was ineffective for failing to raise this issue on direct appeal. . . . As we do not find that Appellant's claim for prosecutorial misconduct entitles Appellant to a new trial, we do not find that appellate counsel was ineffective for failing to raise this issue").

Even if the Superior Court had not addressed the ineffectiveness claim on the merits, failure to include the amended petition in the certified record would serve as "cause" to excuse a procedural default on the ineffective assistance of counsel claim, not on the prosecutorial misconduct claim. There is no need to examine whether there is "cause" to excuse procedural default of the ineffective assistance of counsel claim because I find that Talmadge's ineffective assistance of counsel claim is exhausted.

like other constitutional claims, to first be exhausted in state court. *Id.* The exhaustion doctrine "requires that a claim of ineffective assistance [of counsel] be presented to the state courts as an independent claim before it may be used to establish cause for a procedural default." *Carrier*, 477 U.S. at 489.

Talmadge did raise the ineffective assistance of counsel claim in his amended PCRA petition and the Superior Court addressed it on the merits, so the claim was exhausted at the state level. Thus, before I may decide whether to excuse the procedural default of his prosecutorial misconduct claim, I must evaluate whether appellate counsel was constitutionally ineffective, as to establish "cause" for the procedural default.

The relevant "clearly established" federal precedent for an ineffective assistance of counsel claim was announced in *Strickland v. Washington*, 466 U.S. 668 (1984). *See* ***Carrier*****, 477 U.S. at 488. To establish constitutionally ineffective assistance of counsel under *Strickland,* a defendant must show that: (1) that his counsel's representation was deficient such that it "fell below an objective standard of reasonableness," and (2) that the deficient performance prejudiced his trial to the extent that it undermined confidence in the trial's outcome. 466 U.S. at 687.** Thus, I must apply the deferential standard provided by AEDPA, to decide whether the Pennsylvania Superior Court's decision was "contrary to" *Strickland*, "involved an unreasonable application" of *Strickland*, or "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented." 28 U.S.C. § 2254(d).

**Here, counsel's performance was not deficient for failing to allege prosecutorial**

misconduct on direct appeal because such a claim has no merit.[9] The Superior Court reviewed the underlying prosecutorial misconduct claim on its merits in deciding whether counsel was ineffective for not bringing the claim on direct appeal. *Commonwealth v. Talmadge,* No. 2397 EDA 2002, at 7-10 (Pa. Super. Ct. Oct. 20, 2003). The court concluded that though the prosecutor acted improperly, his question did not "so prejudice Judge Lineberger, as factfinder, that he could not render a true verdict." *Id.* at 8. The court sustained defense counsel's objection to the car chase question and the petitioner never answered the question. Therefore, no evidence of the car chases was on the record and Judge Lineberger specifically stated that the question was not considered in his deliberations. *Id* at 9-10. Also, the Superior Court found that a single reference to the car chases in the prosecutor's question did not contribute to the verdict, given the testimony of two eyewitnesses to the crime who had both known Talmadge and the victim, and evidence of Talmadge's flight to North Carolina after the shootings. *Id.* at 9. The Superior Court decided that because Talmadge's claim of prosecutorial misconduct was not meritorious, appellate counsel was not deficient for failing to raise the issue.[10] *Id.* at 10.

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[9]"Although the question of the merit of an underlying claim is not an explicit step under *Strickland*, [the Third Circuit has] held that it is a determinative factor in the 'deficient performance' prong of the Strickland analysis in at least some contexts." *Rompilla v. Horn,* 355 F.3d 233, 249 n.9 (3d Cir. 2004) (citing *Parrish v. Fulcomer,* 150 F.3d 326, 328, where the court held that counsel was not ineffective for failing to raise a meritless claim).

[10]The Superior Court relied upon the standard of ineffective assistance of counsel articulated by the Pennsylvania Supreme Court in *Commonwealth v. Fulton*, 830 A.2d 567, 572 (Pa. 2003). To overcome the presumption of counsel's effectiveness, the petitioner has the burden to demonstrate that "(1) his underlying claim is of arguable merit; (2) the particular course of conduct pursued by counsel did not have some reasonable basis designed to effectuate his interests; and (3) but for counsel's ineffectiveness, there is a reasonable probability that the outcome of the challenged proceeding would have been different." *Id.* Both the Third Circuit and the Pennsylvania Supreme Court have held that this standard is materially identical to that set forth in *Strickland*. *See Werts v. Vaughn*, 228 F.3d 178, 204 (3d Cir. 2000) (finding that the

This court agrees with the Superior Court's conclusion that counsel's performance was not deficient for failing to allege prosecutorial misconduct on direct appeal because such a claim has no merit.[11] Talmadge has not provided any evidence that his appellate counsel's decision not to include the prosecutorial misconduct claim on appeal fell below an objective standard of reasonableness. More importantly, he has not shown that there is a reasonable probability that had such an argument been presented on appeal, it would have been meritorious. Counsel cannot be deemed constitutionally ineffective for failing to raise a meritless claim. *Werts v. Vaughn,* 228 F.3d 178, 203 (3d Cir. 2000). Therefore, Talmadge has not established that appellate counsel was deficient as is required to prove ineffective assistance of counsel under *Strickland.* Because Talmadge's appellate counsel was not constitutionally ineffective, there is no cause to excuse his procedural default on the prosecutorial misconduct claim.[12]

Even if the petitioner's prosecutorial misconduct claim was not procedurally defaulted, the claim would fail on the merits. As discussed previously, the Superior Court found the petitioner's prosecutorial misconduct claim lacked merit, in the context of dismissing Talmadge's ineffective assistance of counsel claim. After considering the same evidence as the state courts, Magistrate Judge Hart also concluded that the prosecutor's misconduct did not meet

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Pennsylvania standard is "not contrary to" the Strickland test); *Commonwealth v. Pierce*, 515 Pa. 153, 161, 527 A.2d 973 (1987) (holding that Pennsylvania's ineffectiveness standard and the Strickland test "constitute the same rule").

[11]In the report and recommendation Magistrate Judge Hart also concluded that the prosecutor's misconduct claim had no merit based on federal law, therefore finding the Superior Court's decision was not "contrary to" or an "unreasonable application of federal law" or "based on an unreasonable determination of the facts." 28 U.S.C. § 2254(d).

[12]In the absence of cause, a court does not need to reach the question of prejudice. *See Smith v. Murray*, 477 U.S. 527, 533 (1986).

the standard announced in *Darden v. Wainwright*, 477 U.S. 168, 181 (1986), in which the Supreme Court held:

> It is not enough that the prosecutors' remarks were undesirable or even universally condemned. The relevant question is whether the prosecutors' comments so infected the trial with unfairness as to make the resulting conviction a denial of due process. Moreover, the appropriate standard of review for such a claim on writ of habeas corpus is the narrow one of due process, and not the broad exercise of supervisory power.

This court agrees with both the Superior Court and the report and recommendation that the prosecutor's question did not infect the trial with unfairness as required by *Darden* for all of the same reasons that appellate counsel was not deficient for failing to bring a prosecutorial misconduct claim. "Inappropriate prosecutorial comments, standing alone, [do] not justify a reviewing court to reverse a criminal conviction obtained in an otherwise fair proceeding." *United States v. Young,* 470 U.S. 1, 11 (1985). The court must consider the effects of the prosecutor's misconduct on the factfinder's ability to judge the evidence fairly. *Id.* Here, only one improper question was asked, an objection was sustained, and the question went unanswered; no evidence was put before Judge Lineberger. Talmadge was convicted in a bench trial and an experienced judge who understands the complexities of the law can ignore an improper question even more easily then a jury of lay people. Also, Talmadge admitted shooting the victim and the car chase was unrelated to the ultimate question regarding whether the petitioner shot the victim in self defense. Therefore, Talmadge's prosecutorial misconduct claim does not meet the *Darden* standard and fails on its merits.

In his objections to the report and recommendation, Talmadge claims there was second incidence of prosecutorial misconduct. He alleges that Detective Joseph Fischer's testimony

about the petitioner's arrest for auto theft in North Carolina, in violation of the motion suppressing this evidence, was due to prosecutorial misconduct. (Reply to Resp. to Pet. for Writ of Habeas Corpus at 4), (Pet'r's Objections to Report and Recommendation at 1). However, Talmadge never fairly presented this claim in state court; thus the claim is unexhausted and procedurally defaulted and the petitioner alleges no cause or prejudice to excuse the procedural default.

Even if the claim was exhausted, it is still meritless. The petitioner has not tied the detective's testimony to any improper conduct on the part of the prosecutor. Detective Fischer's testimony was given in response to the prosecutor's question on direct, asking the detective to tell the court "exactly what you did from the beginning when you were assigned this case in the attempt to apprehend the defendant?" (Trial Tr. 121, Sept. 16, 1997.) Detective Fischer gave five pages of testimony regarding the two year time line of the investigation and mentioned Talmadge's auto theft arrest as the next step in the chain of events. *Id.* at 121-126. The petitioner offers no evidence that an open ended question, such as the one asked by the prosecutor, was directed at eliciting testimony that violated the motion in limine. Thus, I cannot say that the prosecutor did anything remotely improper with reference to Detective Fischer's testimony that would rise to the level of a prosecutorial misconduct claim.[13]

Talmadge relies on *Brecht v. Abrahamson*, 507 U.S. 619, 638 n.9 (1993) to support his argument that the prosecutorial misconduct rose to a level that warrants habeas relief. (Reply to Resp. to Pet. for Writ of Habeas Corpus at 4), (Pet'r's Objections to Report and

[13]Additionally, defense counsel immediately raised an objection to the Detective's testimony, which was sustained by the court.

Recommendation at 1). In *Brecht*, the Supreme Court held that the standard for determining whether habeas relief must be granted is whether a constitutional error in the trial "had substantial and injurious effect or influence in determining the jury's verdict." 507 U.S. at 623. The court went on to say:

> Our holding does not foreclose the possibility that in an unusual case, a deliberate and especially egregious error of the trial type, or one that is combined with a pattern of prosecutorial misconduct, might so infect the integrity of the proceeding as to warrant the grant of habeas relief, even if it did not substantially influence the jury's verdict.

*Brecht*, 507 U.S. at 638 n.9. Talmadge contends that his case fits squarely within the footnote nine exception,[14] because the state prosecutor's question "was both deliberate and especially egregious." (Reply to Resp. to Pet. for Writ of Habeas Corpus at 5.) He argues that after "Judge Temin deemed evidence of auto theft and high-speed car chases 'extremely prejudicial'" the prosecutor "intentionally violate[d] Judge Temin's ruling, interjecting the prejudicial matter into the trial." *Id.*

The petitioner is incorrect in his argument that *Brecht* applies to his case. In order to grant habeas relief, not only must the court find that a constitutional error occurred during trial, the court must also find that the error was not harmless. *Yohn v. Love,* 76 F.3d 508, 522 (3d Cir.

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[14]The petitioner twice misstates the language in *Brecht*, in an attempt to convince the court that footnote nine concerns a single instance of prosecutorial misconduct. He asserts that the Supreme Court in *Brecht* left open the possibility that "a deliberate and especially egregious error of prosecutorial misconduct might so infect the integrity of the proceeding as to warrant the grant of habeas relief, even if it did not substantially influence the jury's verdict." *See* (Reply to Resp. to Pet. for Writ of Habeas Corpus at 5), (Pet'r's Objections to Report and Recommendation at 1.) The actual direct quote refers to a "deliberate and especially egregious error of the trial type, or one that is combined with a pattern of prosecutorial misconduct" that might warrant habeas relief. 507 U.S. at 638 n.9.

1996). As discussed previously, the petitioner has failed to raise an exhausted and meritorious prosecutorial misconduct claim, therefore this court need not engage in the harmless error review provided for in *Brecht*.

However, even if the petitioner had established that there existed an exhausted, meritorious constitutional claim, this case does not present the type of situation raised in *Brecht's* footnote nine. Though the Supreme Court has not clarified what might constitute an "unusual case" in the context of footnote nine, the Third Circuit has addressed the issue. The court has found that a "single instance of constitutional error -- the prosecutor's questioning of [the petitioner]" does not undermine the fairness of the proceeding, so as to fall under *Brecht*'s footnote nine. *Marshall v. Hendricks*, 307 F.3d 36, 79 (3d Cir. 2002). In *Hassine v. Zimmerman*, on facts much more egregious than those in the instant case, the Third Circuit found that it was "not here presented with the type of egregious situation alluded to in Footnote Nine." 160 F.3d 941, 961 (3d Cir. 1998). In *Hassine*, the prosecutor asked improper questions three times, objections to these questions were immediately raised and sustained, and the defendant never answered the improper questions. *Id.* Additionally the prosecutor twice made improper reference to the defendant's post-Miranda silence during closing arguments. *Id.* Therefore, if the Third Circuit did not believe that it was appropriate to apply footnote nine in *Hassine*, I fail to see how Talmadge's case, with one allegedly improperly asked question (which was really an improper response from the witness for which he immediately apologized), could possibly qualify under the *Brecht* exception.

In summation, Talmadge's prosecutorial misconduct claim is procedurally defaulted and he has failed to allege sufficient cause to excuse this default. Even if the claim was not

procedurally defaulted, the claim has no merit. Accordingly, I will deny relief on this claim.

*B. Admission of Evidence of Firearms Violated Due Process*

Talmadge argues that he was denied a fair trial, in violation of the Sixth and Fourteenth Amendments, when the state court permitted the introduction of two .380 handguns into evidence at trial. Judge Temin ruled this evidence admissible and a North Carolina policeman testified at trial that these guns were found at his residence at the time of his arrest. **(Trial Tr. 29, Sept. 17, 1997). The petitioner argues that because the victim was killed by .32 caliber gun (Trial Tr. 114, Sept. 16, 1997)**, not the .380 handguns found in North Carolina, evidence of the .380 guns was inadmissible and highly prejudicial. In response, the Commonwealth argues that this federal claim is an unexhausted and procedurally defaulted variant of a state-law claim the petitioner brought in state court. The Commonwealth also argues that even if the claim was not defaulted, it is meritless.

As the petitioner claims, it is true that the admission of evidence in a state criminal trial can rise to the level of a constitutional error, but only if the petitioner can "show that the use of the evidence caused 'fundamental unfairness' in violation of due process." *Peterkin v. Horn*, 176 F. Supp. 2d 342, 364 (E.D. Pa. 2001) (citing *Lisenba v. California*, 314 U.S. 219, 236 (1941)). However, "state prisoners must give the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process," before presenting a federal claim in a federal court. *O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999). In his report and recommendation, Judge Hart found that Talmadge never fairly presented this federal claim to the state courts; instead Talmadge stated a state law evidentiary

claim on direct and collateral appeal. Therefore, Judge Hart found that Talmadge never exhausted his due process claim. I agree with Judge Hart that Talmadge's due process claim is unexhausted because he never raised the claim on direct or collateral appeal.

On direct and collateral appeal, the petitioner only claimed that the evidentiary ruling violated state law. *See* Appellant's Brief, 713 EDA 1999, at 23-27; Amended PCRA Petition, No. 0778., Aug. 14, 2001, at 3; Appellant's PCRA Brief, No. 2397 EDA 2002, at 19-26. Talmadge's briefs on direct and collateral appeal argued that the admission of the two handguns violated the governing Pennsylvania evidentiary standards and cited numerous Pennsylvania cases based on state law in support of the argument. Thus, the state courts were never put on notice of a federal claim so that it was never "fairly presented" to the state courts for their decision. *See Duncan v. Henry*, 513 U.S. 364, 366 ("If a habeas petitioner wishes to claim that an evidentiary ruling at a state court trial denied him the due process of law guaranteed by the Fourteenth Amendment, he must say so, not only in federal court, but in state court.").

Talmadge contends that passing references in his state court briefs to "due process," and the constitution did present a federal claim. *See* Appellant's Brief, 713 EDA 1999, at 23 ("denied the defendant a fair trial"); Amended PCRA Petition, No. 0778., Aug. 14, 2001, at 3 ("deny him his constitutional guarantee of a fair and impartial hearing"); Appellant's PCRA Brief, No. 2397 EDA 2002, at 21 ("denying him his constitutional guarantee of a fair and impartial hearing"). Brief references to "fair trial," "due process," and "constitution" are not enough to give the state courts notice that a petitioner is raising a federal due process claim. *Keller v. Larkins*, 251 F.3d 408, 413 (3d Cir. 2001). The Third Circuit has found that a state court brief "barely passes muster" to raise a federal claim, when the brief explicitly invoked the

Fourteenth Amendment, relied on a Supreme Court case, and presented the factual underpinnings of a federal claim. *Minett v. Hendricks,* 135 Fed. Appx. 547, 552 (3d Cir. 2005). Unlike the petitioner in *Minett,* Talmadge's state court briefs make no mention of any judicial decision based on the federal Constitution and do not explicitly invoke any part of the Constitution. The state courts confined their analysis to the application of state law, without any discussion of a federal claim. Therefore, it can not be said that Talmadge fairly presented a claim to the state courts that his federal due process rights were violated by the admission of the handgun evidence, and I find that the claim is unexhausted.

Even if the petitioner's claim had been exhausted, it has no merit because Talmadge can not establish that the evidentiary ruling permitting the admission of the guns rose to the level of a due process violation. The essence of the due process right is fundamental fairness. *Estelle v. Willliams,* 425 U.S. 501 (1976). "Evidentiary errors of state courts are not considered to be of constitutional proportion, cognizable in federal habeas corpus proceedings, unless the error deprives a defendant of fundamental fairness in his criminal trial." *Bisaccia v. Attorney Gen.,* 623 F.2d 307, 312 (3d Cir. 1980), citing *Donnelly v. DeChristoforo,* 416 U.S. 637, 642-43 (1974).

Here, admission of the gun evidence did not render the trial fundamentally unfair. When the petitioner was questioned regarding the two .380 caliber guns during cross-examination, the judge interjected sua sponte: "Sustained. Doesn't matter. They're not connected with this case." (Trial Tr. 62, Sept. 17. 1997). At the trial there was never any question that the guns recovered were not involved with the shooting of Demetrius Shelley. Talmadge admitted shooting the victim and the gun evidence was unrelated to the ultimate issue regarding whether the petitioner shot him in self defense. Also, Talmadge was tried before a seasoned trial judge who was better

able to give the proper weight to the gun evidence than a jury would have been. Therefore, the mention of the weapons found when Talmadge was arrested did not render the trial fundamentally unfair.

Rather than disagree with Judge Hart's finding that his due process claim is unexhausted, in his objections to the report and recommendation, the petitioner re-defines his habeas claim. He now appears to argue that a due process violation occurred when the Superior Court, on direct appeal, did not review two new state court decisions regarding the admission of weapon's evidence, *Commonwealth v. Robinson*, 721 A.2d 344 (Pa. 1998) and *Commonwealth v. Marshall*, 743 A.2d 489 (Pa. Super. 1999). The opinions in these cases were both issued after the post trial motions were decided on August 18, 1998 and before the Superior Court affirmed the trial court's decision on March 28, 2000.[15] The petitioner alleges that his state evidentiary claim was resolved by the trial court based on law that was overruled while his direct appeal was before the Superior Court. The petitioner argues that the Superior Court's failure to apply these decisions implicates the due process clause.

Talmadge has provided no case law directly supporting his argument that a petitioner's due process rights are violated when a state court does not speak directly to new state case law in resolving a state evidentiary issue. In the instant case it is not clear that the Superior Court did not apply the *Robinson* and *Marshall* cases. The Superior Court relied on "the parties' briefs, the record, and the relevant case law" when it affirmed the trial court's decision that it was not error to admit evidence of the .380 handguns. *Commonwealth v. Talmadge*, No. 713 EDA 1999, at 2

[15]*Commonwealth v. Robinson*, 721 A.2d 344 (Pa. 1998) was filed on November 24, 1998. *Commonwealth v. Marshall*, 743 A.2d 489 (Pa. Super. 1999) was filed on December 15, 1999.

(Pa. Super. Mar. 28, 2000). "It is not the province of a federal habeas court to reexamine state-court determinations on state-law questions." *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991). This court is in no position to second-guess on habeas review the state court's determination as to a state law evidentiary issue and the application of its own case law. I must rather review for a potential violation of federal law, and Talmadge has failed to prove that his custody is in violation of the Constitution or federal law.[16]

Even if the petitioner's claim raised a recognizable due process violation, before this court will rule on the constitutionality of the Superior Court's decision not to specifically address *Robinson and Marshall*, Talmadge must first exhaust the claim in state court. To comply with AEDPA's exhaustion requirement of §2254(b)(1)(a), **the petitioner must fairly present his federal claim to the state courts before presenting the claim to a federal court in a habeas petition.** ***Landano*** *v. Rafferty*, 897 F.2d 661, 669-670 (3d Cir. 1990). Talmadge failed to bring a state law based challenge to the Superior Court's supposed failure to apply *Robinson* and *Marshall* decisions, let alone posit any federal basis for such a claim. In neither his PCRA petition nor appeal brief, did Talmadge argue that the Superior Court's decision on direct appeal was in error

[16]Because I find the petitioner is not raising a federal claim, I need not address whether the claim is procedurally defaulted. Therefore, I will not review petitioner's arguments that an attempt to assert the claim in state court would be futile or that sufficient cause and prejudice exist to excuse the default because the claim was not reasonably available to counsel. The futility doctrine and the cause and prejudice standard exist to allow habeas review of defaulted *federal* law claims, not state law claims. However, I do note that *Commonwealth v. Robinson*, 721 A.2d 344 (Pa. 1998), one of the cases the petitioner claims announced a new evidentiary rule, was filed on November 24, 1998. The petitioner's brief on direct appeal was filed on July 16, 1999, more than seven months after the decision in *Robinson*. Therefore, the petitioner is incorrect in asserting that his counsel on direct appeal "could not know that *Robinson* . . . would change the evidentiary standard while petitioner's appeal was pending." (Pet'r Objections to Report and Recommendation, 4).

for failing to apply the two cases at issue; instead he asserted the underlying state law claim that the .380 handguns were wrongly admitted into evidence. *See* Amended PCRA Petition, No. 0778., Aug. 14, 2001, at 3; Appellant's PCRA Brief, No. 2397 EDA 2002, at 19-26. Within the context of the evidentiary claim, the petitioner argued for the retroactive application of *Commonwealth v. Marshall,* 743 A.2d 489 (Pa. Super. 1999), but there is no discussion of the Superior Court's failure to apply *Marshall* on direct appeal. In addition, *Commonwealth v. Robinson,* 721 A.2d 344 (Pa. 1998), is not cited or discussed in any of Talmadge's state court briefs. Thus, even if the petitioner's claim that the Superior Court's failure to apply *Robinson* and *Marshall* on direct appeal constituted a due process violation, such a claim is unexhausted.

This court concludes that Talmadge failed to give the Pennsylvania courts the opportunity to act on the claim he was denied due process by the admission of the two .380 handguns into evidence. Therefore, the petitioner failed to exhaust this claim. Petitioner's second claim, that a due process violation occurred when the Superior Court did not review *Robinson* and *Marshall* on direct appeal, will be denied because this court lacks the authority to review Pennsylvania's application of its own retroactivity principles. Also, even if the petitioner had stated a valid due process claim, Talmadge failed to exhaust the claim in state court.

*C. Motion for Appointment of Counsel*

Talmadge has filed a motion asking the court to appoint counsel to represent him in the instant habeas proceeding. Pro se petitioners have no automatic constitutional or statutory right to representation in a federal habeas proceeding. *See Coleman v. Thompson*, 501 U.S. 722, 752 (1991). "Any person seeking relief under § 2254 may be granted counsel, however, 'whenever

the United States magistrate or the court determines that the interests of justice so require and such a person is financially unable to obtain representation.'" *Reese v. Fulcomer*, 946 F.2d 247, 263 (3d Cir. 1991) (quoting 18 U.S.C. § 3006A(g)). I agree with Magistrate Judge Hart's recommendation that the petitioner's motion for appointment of counsel be denied because Talmadge's petition, briefs, and state court filings adequately presented the issues of which he complains. Further, having determined that the issues raised in Talmadge's petition do not warrant federal habeas relief, I find that his request for the appointment of counsel is moot.

**V. CERTIFICATE OF APPEALABILITY**

When a district court issues a final order denying a § 2254 petition, the court must also decide whether to issue a certificate of appealability. See Third Circuit Local Appellate Rule 22.2. The court may issue a certificate of appealability only if the defendant "has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Where a district court rejects a habeas petition on procedural grounds, to satisfy § 2253(c) the petitioner must demonstrate that "jurists of reason" would find it debatable: (1) whether the petition states a valid claim of the denial of a constitutional right, and (2) whether the court was correct in its procedural ruling. *Slack v. McDaniel*, 529 U.S. 473, 484 (U.S. 2000)

Here, the court has analyzed Talmadge's claims and denied them. I am persuaded that reasonable jurists would not find this assessment debatable or wrong. Therefore, Talmadge has failed to make a substantial showing of the denial of a constitutional right, and a certificate of appealability will not issue.

**VI. CONCLUSION**

For the reasons explained above, I will overrule petitioner's objections, adopt Magistrate Judge Hart's recommendation, and deny and dismiss the instant petition for writ of habeas corpus. An appropriate order follows.

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

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| AVERY TALMADGE,<br>Petitioner,<br><br>v.<br><br>EDWARD KLEM,<br>and<br>THE DISTRICT ATTORNEY OF THE COUNTY OF PHILADELPHIA,<br>and THE ATTORNEY GENERAL OF THE STATE OF PENNSYLVANIA<br>Respondents. | : | CIVIL ACTION<br><br>No. 04-CV-2720 |

**ORDER**

And now on this _____ day of December, 2005, upon consideration of petitioner 's petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 and motion requesting appointment of counsel (Doc. #17), respondents' response thereto, petitioner's reply to the response, review of the United States Magistrate Judge Jacob P. Hart's Report and Recommendation (Doc. #18), and consideration of petitioner's objections to the report and recommendation, it is hereby ORDERED that:

1. Petitioner's objections are OVERRULED;

2. The recommendation of the magistrate judge is APPROVED and ADOPTED;

3. Petitioner's motion for appointment of counsel is DENIED;

4. The petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254 is DISMISSED and DENIED;

5. The petitioner having failed to make a substantial showing of the denial of a constitutional right, there is no ground to issue a certificate of appealability, *see* 28 U.S.C. § 2253(c); and

6. The Clerk shall CLOSE this case statistically.

_____

William H. Yohn, Jr., Judge